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October 12, 2005

Waiver Request
Federal Communications Commission
Office of the Secretary
445-12th Street, SW
Washington, DC 20554

*Sent via FCC ECFS (Electronic
Comment Filing System) and U.S.
Express Mail with return receipt*

Re: Waiver Request
CC Docket No. 02-6

Applicant Name: Greenfield Public School District
Billed Entity Number: 120147

- a) Application Number 431911, Funding Request Number 1200562*
b) Application Number 431129, Funding Request Number 1199414

Funding Year 2004

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To Whom It May Concern

I am writing this letter to request a Waiver in response to the USAC *Administrator's Decisions on Appeal (ADA) - Funding Year 2004-2005* dated September 29, 2005 for the above referenced applications and funding requests.

Those ADA letters state:

Our records show that your appeal was postmarked more than 60 days after the date your Funding Commitment Decision Letter was issued...Federal Communications Commission (FCC) rules require applicants to postmark appeals within 60 days of the date on the decision letter being appealed. FCC rules do not permit the Schools and Library Division (SLD) to consider your appeal.

Greenfield Public Schools respectfully requests the FCC to waive the rules governing the missed deadline for filing timely appeals for *a) Application Number 431911, Funding Request Number 1200562*; and *b) Application Number 431129, Funding Request Number 1199414* because of very special circumstances that could not be avoided even with careful planning. Overturning the SLD decision of September 29, 2005 constitutes a special deviation from the FCC rules that would best serve the public interest.

Extenuating circumstances prevented the Greenfield Public Schools District from submitting both the required documentation for SLD funding and a timely appeal of the Funding Commitment Decisions (FCD) issued by the USAC on December 3, 2004.

Scott Carbee, the District Technology Coordinator who applied for E-Rate funding on behalf of the Greenfield Public Schools was ordered to U.S. military service active duty during the E-RATE application process. In answering his country's call to duty, he did not have time to attend to such civilian matters as: a) submitting the necessary documentation in support of District Form 471 applications, and b) filing the necessary appeal with the USAC in response to FCD letters, dated December 3, 2004.

Greenfield Public Schools District requests that you grant a one-time deviation from the rules Waiver for missed deadlines for Form 471 documentation and for filing an appeal because of a very unusual situation that clearly serves our country's national security and the public interest. Granting this waiver would not set a precedent that could be widely applied in requests submitted by others.

The undersigned respectfully submit that under the particular factual circumstances set forth above:

- (1) Allowance of this waiver request is mandated by Congressional legislative policy protecting U.S. military reservists and their employers;
- (2) Denial of this waiver request would constitute an unlawful abuse of discretion;
- (3) Cases, such as the one *sub judice*, involving a military reservist called to active duty constitute an appropriate limited exception to the policy (expressed in prior FCC cases) of not granting waivers due to personnel problems; and
- (4) A rule that the FCC will grant waivers on a case-by-case basis where a funding deadline is missed because a U.S. military reservist is suddenly ordered to active duty constitutes an "appropriate general standard."¹

¹ *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027, 93 S.Ct. 461, 34 L.Ed.2d 321(1972).

(1) Allowance of this waiver request is mandated by Congressional legislative policy protecting U.S. military reservists and their employers.

Particularly since 9/11, national defense constitutes an overriding public policy priority that should be recognized as constituting "good cause shown" for a waiver under 47 C.F.R. 1.3. Like all employers, the Greenfield Public Schools District is required by law to honor the provisions of The Veterans Reemployment Rights Act, which was replaced in 1994 by the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4333. Section 4301(2) states that the purposes of the act include the following: "to minimize the disruption to the lives of persons performing service in the uniformed services ***as well as to their employers***, their fellow employees, and their communities... [Emphasis added]."

In order to make this legislative policy meaningful, the FCC cannot lawfully penalize a service member's employer for a failure to meet a filing deadline that directly results from the service member's call to active duty in the armed forces of the United States. See *Micalone v. Long Island Railroad Co.*, 582 F.Supp. 973, 980 (S.D.N.Y. 1983) ("[T]he [Veterans Reemployment Rights] Act was not intended to penalize the employer...."), and *Duarte v. Agilent Technologies, Inc.*, 366 F.Supp.2d 1039, 1045 (D.Colo. 2005) ("[B]oth USERRA and its predecessor statutes are to be liberally construed for the benefit of those who left private life to serve their country.").²

Denial of this waiver request would make it necessary to avoid placing reservists or those who serve in the National Guard in positions of responsibility where their sudden departure for active duty would result in the employer being penalized. Yet such a policy could place an employer in violation of USERRA.

(2) Denial of this waiver request would constitute an unlawful abuse of discretion.

Creating a Hobson's choice³ for an employer is precisely the sort of abuse of discretion that the undersigned respectfully submit would support judicial action overturning denial of a waiver in the case *sub judice*. See *People of the State of New York & Public Service Commission of the State of New York v. FCC*, 267 F.3d 91, 107 (2nd Cir. 2001), quoting *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1222 (D.C. Cir. 1999).

The undersigned's research has found no evidence that the circumstances of the present case (e.g. the civilian fallout from calling reservists to active duty in the midst of a

² The Veterans Reemployment Rights Act was replaced in 1994 by the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4333.

³ Merriam Webster's Unabridged Online Dictionary defines the term "Hobson's choice" in this context as "the necessity of accepting one of two or more equally objectionable things." In the case *sub judice*, the Hobson's choice is forcing the Greenfield Public Schools to choose between: (a) placing reservists in administrative positions where their sudden departure for active duty would result in the employer being penalized; or (b) violating USERRA by denying executive positions to reservists.

national emergency) were previously considered by the FCC. The Greenfield Public Schools District recognizes that "a heavy burden traditionally has been placed upon one seeking a waiver to demonstrate that his arguments are substantially different from those which have been carefully considered at the rulemaking proceeding." *Federal Broadcasting Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970) citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969).

(3) Cases, such as the one sub judice, involving a military reservist called to active duty constitute an appropriate limited exception to the policy (expressed in prior FCC cases) of not granting waivers due to personnel problems.

The undersigned have attempted to develop a thorough understanding of the FCC decisions that uniformly deny waiver requests from school districts for missed filing deadlines.⁴ Review of the cases shows that none of them involve a military call to duty in

⁴ E.g., Request for Review of the Decision of the Universal Service Administrator by Information Transport Solutions, Inc., File No. SLD-303637, CC Docket No. 02-6, 20 FCC Rcd. 8157, 2005 WL (WestLaw) 936922, ¶ (Wireline Comp. Bur. 2005) ("Neither staffing changes nor misunderstanding of the rules relieves applicants of their responsibility to comply with the Commission's rules and procedures.");

Request for Review of the Decision of the Universal Service Administrator by School Administrative Unit 4, et al, File Nos. SLD-356431, 376633, 381717, 365343, CC Docket No. 02-6, 20 FCC Rcd. 2175, 2005 WL 267898, ¶ 2 (Wireline Comp. Bur. 2005) ("Employee misunderstandings about whether an application was approved or due to personnel changes do not relieve applicants of their responsibility to understand and comply with the program rules or procedures.");

Requests for Waiver by Lucia Mar Unified School District et al, File Nos. SLD-249712, 252798, 257333, 224552, 224651, 214771, 217775, CC Docket No. 02-6, 19 FCC Rcd. 20,264, 2004 WL 1176618, ¶ 3 (Wireline Comp. Bur. 2004) ("[N]either illness nor misunderstanding of employees relieves applicants of their responsibility to understand and comply with the program rules or procedures.");

Requests for Review of the Decision of the Universal Service Administrator by Austin Independent School District et al, File Nos. SLD-231412, 222626, 253928, 245518, CC Docket No. 02-6, 19 FCC Rcd. 8904, 2004 WL 1093436, ¶ 2 (Wireline Comp. Bur. 2004) ("[N]either employee illness nor misunderstanding relieves applicants of their responsibility to comply with the Commission's requirements.");

Matter of Request for Review of the Decision of the Universal Service Administrator by Bedford Area School District, et al, File Nos. SLD-339394, 375419, 368582, 383011, 385468, 376156, 376655, 383046, 383015, 381166, 376993, 384029, 384282, 372104, CC Docket No. 02-6, 19 FCC Rcd. 8131, 2004 WL 943480, ¶ 2 (Wireline Comp. Bur. 2004) ("Neither staffing problems, financial need nor inclement weather relieve applicants of their obligations to comply with our rules and procedures.");

Request for Waiver by Duncan Public Library, et al, File Nos. SLD-325536, 326068, 325441, 325298, CC Docket Nos. 96-45 & 97-21, 17 FCC Rcd. 22430, 2002 WL 314777000, ¶ 3 ("We have held that neither employee illness nor misunderstanding relieves applicants of their responsibility to understand and comply with the Commission's rules and

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which the circumstances of an employee's sudden departure are subject to specific Congressional legislative protection such as USERRA.

The undersigned's research has not uncovered a single decision in which such a school district or library request for waiver of an E-Rate deadline has been granted. The FCC does have a legal obligation to make sure that a waiver request is, "not subject to perfunctory treatment, but must be given a 'hard look.'" *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027, 93 S.Ct. 461, 34 L.Ed.2d 321(1972). In that decision, the District of Columbia Circuit remanded a waiver denial to the FCC, enunciating the following standard:

[A]n application for waiver has an appropriate place in the discharge by an administrative agency of its assigned responsibilities. The agency's discretion

procedures. We do not assess how an applicant delegates that responsibility to employees.");

Requests for Waiver by Nederland Independent School District, et al, File Nos. SLD-274014, 261467, CC Docket Nos. 96-45 & 97-21, 17 FCC Rcd. 19544, 2002 WL 31955976, ¶ 2 (Wireline Comp. Bur. 2002) ("We have consistently held that personnel disruptions, employee medical conditions, or employee confusion or misunderstanding about SLD rules and deadlines do not rise to the level of special circumstances required for a waiver.");

Request for Waiver by Dermott Special School District et al, File Nos. SLD-252777, 261808, 277850, 265880, 257325, 270374, 220712, 252443, 256802, 257092, 257221, 257582, 257352, 257702, 259623, CC Docket Nos. 96-45 & 97-21, 17 FCC Rcd. 5091, 2002 WL 416877, ¶ 4 (Com. Car. Bur. 2002) ("[U]ltimately it is the applicant who has responsibility for the timely submission of its application. We have held that neither employee illness nor misunderstanding relieves applicants of their responsibility to understand and comply with the program.");

Request for Waiver by East Brunswick Public Schools, File No. SLD No. 276585, CC Docket Nos. 96-45 & 97-21, 16 FCC Rcd. 19274, 2001 WL 1335037, ¶ 6 (Com. Car. Bur. 2001) ("The applicant must also assume responsibility over the actions of those employees to whom it gives responsibility for submitting timely and proper requests for discounts in its name.");

Request for Review of the Decision of the Universal Service Administrator by New Orleans Public Schools, File Nos. SLD-201456, 201463, 201409, 201449, 201493, CC Docket Nos. 96-45 & 97-21, 16 FCC Rcd. 16653, 2001 WL 1090573, ¶ 18 (Com. Car. Bur. 2001) ("[W]e find that the personnel disruptions that New Orleans alleges do not constitute good cause to grant a waiver....Here, the necessity of replacing a sick employee skilled in the application process for the schools and libraries program provides no basis for deviating from the Commission's policy of placing on the applicant the responsibility for understanding program rules and requirements.");

Request for Waiver by Danbury Public Schools, File No. NEC.471.04-13-00.31900001, CC Docket Nos. 96-45 & 97-21, 16 FCC Rcd. 12936, 2001 WL 717077, ¶ 5 (Com. Car. Bur. 2001) ("An applicant must take responsibility for the actions of those employees to whom it gives responsibility for submitting timely and proper requests for discounts on its behalf.").

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to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances. [Citations omitted.]

The salutary presumptions do not obviate the need for serious consideration of meritorious applications for waiver, and a system where regulations are maintained, inflexibly without any procedure for waiver poses legal difficulties. The Commission is charged with administration in the "public interest." That an agency may discharge its responsibilities by promulgating rules of general application, which, in the overall perspective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular individualized cases...

418 F.2d at 1157. The FCC decisions denying E-Rate waiver requests simply repeat virtually identical language over and over again, suggesting that denial of these applications without the requisite "hard look" may have become a matter of agency routine.

The FCC has repeatedly refused to find special circumstances to justify a waiver even where a filing deadline is missed because inaccurate information was provided to the applicant. *Requests for Waiver by Lucia Mar Unified School District et al*, File Nos. SLD-249712, 252798, 257333, 224552, 224651, 214771, 217775, CC Docket No. 02-6, 19 FCC Rcd. 20,264, 2004 WL 1176618, ¶ 3 (Wireline Comp. Bur. 2004) ("Mistaken information from an SLD employee does not absolve an applicant from following the program requirements."); *Requests for Review of the Decision of the Universal Service Administrator by Austin Independent School District et al*, File Nos. SLD-231412, 222626, 253928, 245518, CC Docket No. 02-6, 19 FCC Rcd. 8904, 2004 WL 1093436, ¶ 2 (Wireline Comp. Bur. 2004) ("Mistaken information from an SLD employee does not absolve an applicant from following the program requirements."). This position violates the doctrine of equitable estoppel,⁵ which the federal courts have applied to the FCC *In Re Federal Communications Commission, Petitioner*, 217 F.3d 125, 132 (2nd Cir. 2000). While demanding that applicants take absolute responsibility for all problems connected with their employees, the FCC refuses to acknowledge responsibility where a missed filing deadline may be directly attributable to incorrect information given out by an SLD employee.

(4) A rule that the FCC will grant waivers on a case-by-case basis where a funding deadline is missed because a U.S. military reservist is suddenly ordered to active duty constitutes a narrow "appropriate general standard."

⁵ Black's Law Dictionary (8th ed. 2004) defines "equitable estoppel" as "A defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." *CC Docket No. 02-6 Appeal of 471 Apps 431911 & 431129, Greenfield Public Schools District, BEN 120147*
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The court has held that "waivers must be founded upon 'an appropriate general standard.'" *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027, 93 S.Ct. 461, 34 L.Ed.2d 321(1972).

The undersigned respectfully submit that the necessary standard is outlined above, recognizing the Congressional mandate of URESSA, and based on a limited case by case consideration of waiver requests where a deadline is missed because an employee is called to active duty in the U.S. armed forces.

Conclusion

The requested waiver should be granted for the reasons set forth above. Thank you for your kind consideration.

Respectfully submitted,

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